



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: BKS Construction Company

File: B-226346; B-226347

Date: May 28, 1987

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### DIGEST

1. Where letter of credit, submitted as a bid guarantee, incorporates terms which indicate that the letter is revocable or which, at the very least, creates an uncertainty as to whether the letter would be enforceable against the issuing bank, the letter is unacceptable as a "firm commitment" within the meaning of the government's standard bid guarantee clause, Federal Acquisition Regulation, 48 C.F.R. § 52.228-1 (1985).
2. A nonresponsive bid cannot be made responsive by actions taken or explanations made after bid opening.
3. Where General Accounting Office determines that one reason for a procuring agency's rejection of a bid is proper, it will not consider allegations regarding other reasons for the rejection.

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### DECISION

BKS Construction Company protests the rejection of its low bids as nonresponsive for failing to provide adequate bid guarantees as required by invitation for bids (IFB's) Nos. DACW66-86-B-0070 and DACW66-86-B-0071, issued by the Army Corps of Engineers, Memphis District for floodway ditch and bank excavation and repair. BKS contends that the letters of credit that it submitted with its bids were acceptable.

We deny the protests.

The IFB's required bid guarantees in the amount of 20 percent of the total bid price. In addition, the solicitations contained the clause specified in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.228-1 (1985). That clause requires bidders to submit bid guarantees in the form of a "firm commitment" such as a bid bond, postal money order, certified check, cashier's check or irrevocable letter of credit, and states that the failure to furnish a

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bid guarantee in the proper form and amount, by the time set for bid opening, may be cause for rejection of the bid.

As its bid guarantees, BKS submitted with its bids letters of credit, signed by the first vice president, of a Missouri bank, and addressed to the Army. The letters of credit were in the amount of 20 percent of BKS' bids, were effective from September 3, 1986, and stated that they "shall expire 90 days from date" (from September 3). In addition, the letters read:

"The funds of this Letter of Credit are available against sight draft(s) and shall be accompanied by signed (certified) letter from an authorized officer of the Department of the Army. The terms of which this letter must expressly indicate the failure of Betty Crawford d/b/a BKS Construction Company to finish this project.

"Except as otherwise expressly stated herein, this Letter of Credit is subject to the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits, 1983 Revision, Publication #400."

The Army determined that the letters of credit were not acceptable as bid guarantees because they were neither irrevocable nor firm commitments, and because they did not guarantee that the required contract documents would be executed. By letter dated September 23, 1986, the Army notified BKS that its bids were rejected as nonresponsive because the letters of credit state that they are conditional and subject to the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits (UCP) which indicates that in the absence of a statement of irrevocability a letter of credit is deemed revocable. In addition, the September 23 letter stated that BKS' letters of credit were unacceptable because they permit sight drafts to be drawn against them by the government only if the Army certifies that BKS has failed "to finish [these] project[s]." The Army's letter stated that this language would not serve the purpose of bid guarantees, to ensure that the bidder executes the required contract documents and provides performance and payment bonds.

BKS protested to the Army against the rejection of its bids, arguing that its letters of credit were irrevocable and fully satisfied the requirements of bid guarantees. In addition, after bid opening, BKS provided the Army with two new letters of credit (to replace the ones rejected) clearly indicating that they are "irrevocable," and a letter from the vice-president of the issuing bank indicating that the

original (as well as the replacement) letters of credit were intended to be irrevocable. Nonetheless, by decision dated February 11, 1987, the Army denied BKS' protests because it concluded that the original letters of credit were revocable, thereby making BKS' bids nonresponsive. BKS' protests to our Office essentially raise the same issues considered by the Army.

The purpose of any bid guarantee, including an irrevocable letter of credit, is to secure the liability of a surety to the government in the event the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 C.P.D. ¶ 400. Thus, the sufficiency of a bid guarantee depends on whether the surety is clearly bound by its terms. When the liability of the surety is not clear, the guarantee properly may be regarded as defective, Desert Dry Waterproofing Contractors, B-219996, Sept. 4, 1985, 85-2 C.P.D. ¶ 268, and the bid must be rejected as nonresponsive. A & A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 C.P.D. ¶ 463.

A letter of credit is essentially a third-party beneficiary contract whereby a party desiring to transact business induces another, usually a bank, to issue a letter to a third party promising to honor that party's drafts or other demands for payment. Alan L. Crouch, B-207653, Oct. 19, 1982, 82-2 C.P.D. ¶ 345. Whether an offered letter of credit will suffice as a bid guarantee depends on whether the credit could be enforced against the issuer if the bidder fails to execute required contract documents. S & S Contracting, B-214927, June 26, 1984, 84-1 C.P.D. ¶ 670. Where a letter of credit contains language which creates an uncertainty as to whether the letter would be enforceable against the issuer, the letter is unacceptable as a "firm commitment" within the meaning of the standard bid guarantee clause. B-163884, Apr. 16, 1968.

The Army argues that the letters of credit submitted with BKS' bids were revocable and therefore unacceptable as a "firm commitment" within the meaning of the IFB's bid guarantee clause (outlined above). See B-163884, supra. In support of its argument, the Army states that the letters of credit incorporated by reference the terms and rules of the UCP. Article 7 of the UCP states that credits may either be revocable or irrevocable and therefore they should clearly indicate whether they are revocable or irrevocable. Under Article 7, in the absence of a clear indication in the documents, "the credit shall be deemed to be revocable." Article 9 of the UCP indicates that a "revocable credit may be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary." Therefore,

the Army contends that since the letters of credit did not clearly indicate that they were irrevocable, under Article 7 of the UCP the letters were revocable, and not adequate as "firm commitments" to protect the rights of the government under the bid guarantee clause of the IFB's. B-163884, supra.

BKS does not disagree with the Army's contention that revocable letters of credit are unacceptable as bid guarantees. However, BKS argues that its letters of credit were irrevocable. In support of its argument, BKS has submitted its applications to the issuing bank for "irrevocable" letters of credit. In addition, the protester cites the case of Shaughnessy v. Mark Twain State Bank, 715 S.W. 2d 944 (1986) to show that under Missouri case law which it argues applies here since the letters were issued in Missouri, that even where there is no express agreement between a customer and an issuing bank as to whether a letter of credit is revocable or irrevocable, where the letter contains an expiration date and the customer is charged a commitment fee upon the establishment of the letter of credit, it has been held that the letter of credit is irrevocable. Finally, to show that its letters of credit were intended to be irrevocable, BKS has submitted a note of explanation from the issuing bank, and copies of two additional replacement letters of credit, issued after bid opening, which state that they are "irrevocable."

BKS has not shown that its letters of credit were clearly irrevocable and, therefore, its letters, either being revocable or ambiguous concerning their revocability, were unacceptable as "firm commitments" under the bid guarantee clause of the IFB. See Juanita H. Burns and George M. Sobley, B-184331, Dec. 18, 1975, 75-2 C.P.D. ¶ 400; B-163884, supra. The letters incorporated the terms of the UCP which indicate that unless credits indicate "clearly" that they are irrevocable, they are considered to be revocable. The fact that BKS applied for "irrevocable" letters of credit is irrelevant since the underlying agreement between a customer and the issuing bank does not affect the beneficiary's rights under a three-party letter of credit, since it is well-settled that the beneficiary's rights under such a letter of credit are based solely upon the letter itself as issued. See, e.g., Pringle-Associated Mortgage Corp. v. Southern National Bank of Hattiesburg, Mississippi, 571 F.2d 871 (5th Cir. 1978); Chase Manhattan Bank v. Equibank, 550 F.2d 882, (3d Cir. 1977); UCP article ("a beneficiary can in no case avail himself of the contractual relationships existing . . . between the applicant for the credit and the issuing bank)."

We find the Shaughnessy case cited by BKS to be inapposite. That case involved a two-party line of credit (between the customer and the issuing bank) versus a three-party credit situation present in the instant case. In Shaughnessy, in contrast to the case here, the letter of credit did not incorporate the terms of the UCP. The court, finding an absence of an express agreement, held that because the bank charged a one-percent commitment fee to the customer, and the credit stated an expiration date, the bank established an irrevocable line of credit for its customer, Shaughnessy.

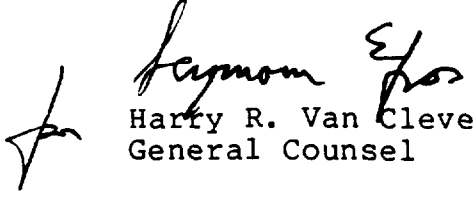
As stated above, however, under the UCP clause 6 (incorporated into the letter of credit) and the cited case law, a beneficiary (the government in this case) cannot enforce any rights not provided by the letter of credit and cannot avail itself of the contractual relationship between the customer and the issuer (bank). Therefore, the fact that the bank charged BKS a fee for the letters of credit does not establish that they were irrevocable. Nor does the fact that the letters contained an expiration date make them irrevocable. See Beathard v. Chicago Football Club, Inc., 419 F. Supp. 1133 (N.D. Ill. 1976) (Three-party letter of credit which contained a definite expiration date and which incorporated similar UCP terms to the ones in the case at hand concerning revocability was held to be a revocable letter of credit, even though the letter stated that it was to "guarantee payment.")

Finally, we reject BKS' argument that the Army improperly determined that it could not consider, after bid opening, the replacement letters of credit which clearly stated that they were "irrevocable," or the letter of explanation from the bank, showing that the bank intended to be bound by the original letters of credit. A nonresponsive bid cannot be made responsive by actions taken or explanations made after bid opening. Imperial Maintenance, Inc., B-224257, Jan. 8, 1987, 87-1 C.P.D. ¶ 34; Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 C.P.D. ¶ 356. Thus, BKS may not, after bid opening, replace the defective (revocable) letters of credit or attempt to establish by extrinsic evidence the bank's alleged intent to be bound irrevocably to the original letters of credit. See Baucom Janitorial Service, Inc., B-206353, supra.

We conclude that BKS' letters of credit did not on their faces evidence an intent to be irrevocable and were properly determined by the Army to be revocable due to their incorporation of the terms of the UCP. Therefore, the rejection as nonresponsive of BKS' bids because they lacked adequate bid guarantees was proper. Imperial Maintenance, Inc., B-224257, supra. Because we find that BKS' bid guarantees were inadequate for the above-stated reasons, and

that the rejection of BKS' bids was proper, we need not address BKS' allegations concerning the other reasons in which the Army found the bid guarantees to be deficient. See TEAM Corp., B-218584, June 27, 1985, 85-1 C.P.D. ¶ 734.

The protests are denied.

  
Harry R. Van Cleve  
General Counsel